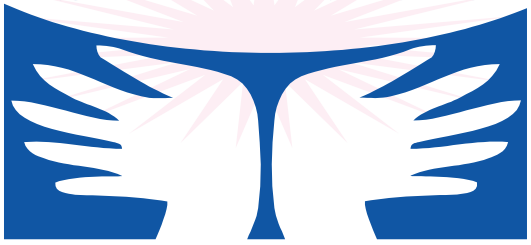
Arts Advocacy



Yes, You Can Do It.

Tips & Techniques to Becoming an Effective Arts Advocate

Advocacy Toolkit
from a Workshop by the California Arts Council's
Arts Marketing Institute

February 3, 2004

Arts Advocacy for 501(c)(3)s

Yes, You Can Do It.

Contents

DEFINITIONS - Advocacy

Advocacy is pursuit of efforts to influence outcomes - including public policy and resource allocation decisions within political, economic, and social systems and institutions - that directly affect people's lives.

Advocacy consists of organized efforts and actions based on the reality of "what is." These organized actions seek to highlight critical issues that have been ignored and submerged, to influence public attitudes, and to enact and implement laws and public policies so that visions of "what should be" in a just, decent society become a reality. Human rights and aspirations - political, economic, and social - provide an overreaching framework for these visions. Advocacy organizations draw their strength from and are accountable to people - their members, constituents, and/or members of affected groups.

Advocacy has purposeful results: to enable social justice advocates to gain access and voice in the decision making of relevant institutions; to change the power relationships between institutions and the people affected by their decisions, thereby changing the institutions themselves; and to bring a clear improvement in people's lives and in society.

Advocacy is standing up for your beliefs and persuading others to support your cause. Advocacy is letting your legislators know what you value, what you want and what you want them to do (e.g., include an arts platform in their political campaigns, support the concept of equitable public funding for the arts, support arts in education and so forth).

DEFINITIONS - Lobbying

Lobbying consists of communications intended to influence ***specific*** legislation or ballot initiatives.

In 1976 Congress ruled that public charities have the right to lobby and may do so legally; however, lobbying is limited by the IRS and by the state's Fair Political Practices Act. Non-profits can choose one of two standards by which their lobbying is measured by the IRS. The oldest and best known requires that "no substantial part" of a charity's activities can be used to attempt to influence legislation. The "no substantial part" is not a strict percentage test. The IRS does not set a percentage as a guideline. **In practice, non-profits often err on the side of limiting their lobbying to 2-3 percent of their time, when in fact they do not need to do so.**

A 501(c)3 can do far more lobbying for specific legislation if it elects to be a 501(h). **They can also elect to form a separate 501(c)(4) organization which can spend all of its money on lobbying and is tax-exempt, however contributions to the 501(c)(4) are not tax exempt. MoveOn.org is a 501(c)(4).** The IRS sets specific dollar amounts for this election: 20 percent of the first $500,000 of an organization's spending can be on lobbying under the 501(h) election, and 15 percent of the next $500,000, etc.

Ballots measures are considered to be legislation, and encouraging voters to cast their votes for or against a ballot measure is treated as lobbying. Collecting signatures for a ballot measure is lobbying. All public charities or non-profits may endorse or oppose ballot measures and urge voters to pass or defeat measures without jeopardizing their exempt status, **although there are the usual filing requirements.**

There are two kinds of lobbying: (a) direct lobbying communication which is an attempt to influence legislation thorough communication with a legislator in order to communicate a view on that legislation or persuade a yes or no vote. **It is appropriate, however, and not considered lobbying for nonprofit entities and government agencies to educate legislators about an issue (e.g. a public health department may let a county board of supervisors know the rate of tobacco deaths in their county and also show them policy options being taken by other counties in the nation without it being considered lobbying).** And (b) grass roots lobbying which is attempting to influence legislation by affecting public opinion, e.g. sending an e-mail to your members or supporters urging a specific position.

TEN NO-BRAINER STEPS TO BECOMING A DAILY ARTS ADVOCATE

From A Bunch of Arts Workers Just Sitting Around Brainstorming

1. Go to http://www.leginfo.ca.gov/yourleg.html and type in your zip code. Get the names and addresses of your representatives and put them on your mailing list. Make sure they get your flyers, postcards and requests for annual donor support.

2. When you learn about an issue or a piece of legislative action, put it in your programs, your newsletter, on your website and/or on handouts in your lobby.

3. Tell your board of directors, your favorite donors and your artists what you think about any issue you become aware of. (This is conversation, not lobbying.)

4. Add as a final item to every meeting agenda, "Does anyone know anything that's going on in the legislature/city council/school board that we should be aware of?"

5. Steal or adapt information from other organizations' materials if they are a few steps ahead of you on the information ladder.

6. Coordinate advocacy with other groups. Build a coalition of arts advocates. (This one speaks for itself.)

7. If you can't make it to local political events or hearings, get a report about what happened.

8. If you make a curtain pitch or other live pitch for donations, mention any action you might be taking and let your audience know how they can take action. If you want them to make phone calls or write letters, have the numbers available.

9. Provide sample letters or emails or talking points for people you are asking to do something specific.

10. Remember that every conversation about your work is an opportunity to change the way your work is perceived. Be passionate, be informed and be unapologetic.

FREQUENTLY ASKED QUESTIONS

If a 501(c)(3) calls for improved public funding for the arts, is this lobbying?

No, it's advocacy. It's your organization's policy position and there are no limits on how much you can communicate this idea. After all, free speech applies to your organization just as it applies to you personally. Advocating for improved public funding of the arts can be a way of preparing the soil for a future piece of legislation (or budget proposal) but it's still considered advocacy until it attaches to a piece of legislation.

If a 501(c)(3) calls for passage of legislation that increases public funding of the arts, is this lobbying?

Yes, it is lobbying because it is related to a specific piece of legislation. And keep in mind that the state budget – or any government entity's budget – is a piece of legislation. So while you can advocate for the idea of greater public funding of the arts, when you support specific budget proposals, that is lobbying. And these activities cannot exceed IRS limitation, i.e., such lobbying cannot be a substantial part of your organizations' activities. For it to legally become a substantial part of your activities, it is recommended that you elect to be a 501(h.)

Can a 501(c)(3) publicly endorse or oppose a ballot measure or proposed legislation?

Of course. But this activity is lobbying and any amount you spend to communicate your position to voters will be a lobbying expenditure and must be reported to the IRS if it exceeds $1,000 in a calendar year.

Can a 501(c)(3)endorse candidates?

No.

What about hosting a debate featuring opposing candidates or speakers from various sides?

This is **not** considered lobbying, and need not be reported, so long as you are strictly neutral in the organization and presentation of the event. This activity would fall under the heading of education, which you are allowed to do.

What about collecting signatures to put a measure on the ballot?

This is considered a direct lobbying activity whether done by paid staff or volunteers. Any costs associated with it that exceed $1,000 in a calendar year must be reported.

What is 501(h)?

501(h) is a section of the Internal Revenue Code that outlines one of two tests for measuring an eligible 501(c)(3) organization's lobbying expenditures. Sometimes called the "expenditure test" or the "20% rule," 501(h) was enacted in 1976 to clarify the much-criticized "insubstantial part" test that the IRS has used since 1934. 501(h) establishes specific dollar limits that are calculated as a percentage of a charity's total exempt purpose expenditures (tax-exempt budget). Under 501(h), a charity may use up to 20% of the first $500,000 of its exempt purpose expenditures to lobby. For organizations with larger budgets, this dollar amount increases, on a sliding scale, to a

maximum of $1 million.

Why would a 501(c)(3) elect 501(h) status?

a) Because 501(h) provides more generous lobbying limits than the "insubstantial part test."
b) Because the 501(h) test is clear and easy to calculate.
c) Because there are clear definitions of various kinds of lobbying communication.
d) Because volunteer and other efforts that do not cost the organization money will not count toward the exhaustion of the lobbying limits.
e) Because an electing charity cannot lose its exemption for a single year's excessive expenditures, while a non-electing charity can.
f) Because there is no personal penalty for individual managers of an electing charity that exceeds its lobbying expenditure limits.

How does a 501(c)(3) charity elect 501(h) status?

Completing the single page form, IRS Form 5768 "Election/Revocation of Election by an Eligible 501(c)(3) Organization to Make Expenditures to Influence Legislation," does the job. It requires only the organization's name, address, and the first tax year to which the lection will apply. A copy of Form 5768 is available at the IRS website www.irs.gov and can be filed when the organization files its annual income tax statement. It need only be filed once, not every year.

Will election of 501(h) status increase the likelihood of an IRS audit?

No.

Will our paperwork increase if we elect 501(h) status?

No.

What about non-lobbying educational activities?

Education related to a ballot measure is not considered lobbying so long as the information is neutral without reflecting any view on its merits.

What about hosting a debate featuring speakers from both sides?

This is not considered lobbying, and need not be reported, so long as you are strictly neutral in the organization and presentation of the event.

What about collecting signatures to put a measure on the ballot?

This is considered a direct lobbying activity whether done by paid staff or volunteers. Any costs associated with it that exceed $1,000 in a calendar year must be reported.

RESOURCES

www.clpi.org - Charity Lobbying in the Public Interest

The Nonprofit Lobbying Guide, Second Edition. Written by Bob Smucker; published in 1999

www.fppc.ca.gov California Fair Political Practices Commission
This agency interprets and enforces the Political Reform Act.

www.ss.ca.gov California Secretary of State
Campaign finance disclosure reports are filed with, and made public by, the agency. See "Campaign and Lobbying Information" at this site.

www.NPAction.org Website on nonprofit advocacy hosted by OMB Watch that includes extensive information on lobbying rules in each state.

Nonprofit Advocacy Rules:
www.canonprofits.org
www.allianceforjustice.org/nonprofit/

Nonprofit Advocacy Trends & Opportunities:
www.independentsector.org
www.givevoice.org/

Arts Advocacy Orgs:
www.artsusa.org/default.asp
www.calartsadvocates.org

IRS 1997 Exempt Organizations Continuing Professional Education Technical Instruction Program. This IRS publication includes an article, mostly in question and answer format, on lobbying issues by IRS employees Judith E. Kindell and John Francis Reilly. It is the only resource listed that covers the lobbying rules for non-electing charities. The article is available at www.irs.gov. (On left side of page, click on "Charities & Non-Profits." Then , on the left side of that page, click on Topics "EO Tax Law Training." On the main part of that page, click on "FY 1997," then "Lobbying Issues.")

RESOURCES - CON'T

The following publications are available at the Alliance for Justice at www.allianceforjustice.org

Being a Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities. This primer is a plain-language roadmap of the lobbying regulations from the Internal Revenue Service as they affect nonprofit organizations. Published 1995, 57 pages

Seize the Initiative. Increasingly, citizens groups are using ballot initiatives and referenda to advance their issues. This guide answers questions frequently asked by nonprofit organizations about working on ballot measures. Published 1996, 56 pages

Nonprofit Advocacy Brochure – Does lobbying make your board nervous? Download or order free copies of the newest brochure from the Nonprofit Advocacy Project to share the message that lobbying by nonprofits isn't just legal - it's important, powerful, and fundamental to democracy. Published 2003, 2 pages

E-Advocacy for Nonprofits. The Law of Lobbying and Election-Related Activity on the Net published 2000, 69 pages

Worry-Free Lobbying for Nonprofits. This booklet describes how nonprofit groups, and the foundations that support them, can take advantage of the clear and generous provisions in federal law that encourage lobbying activity. published 1999, 12 pages

The Connection. Managing more than one type of exempt organization can expand activists' influence on the policy process. published 1998, 62 pages

The Rules of the Game A user-friendly guide that reviews federal tax and election laws which govern nonprofit organizations in an election year. This book explains the right (and wrong) ways to organize specific voter education activities. Published 1996, 52 pages

TEN STEPS TO BECOMING AN EFFECTIVE ARTS ADVOCATE

National Assembly of State Arts Agencies

1. Learn who your legislators are, their committee assignments, their positions in the legislative leadership, and their records on arts issues.

2. Build a relationship with your legislators and their staff. Visit them in their offices in the capital or when they are at home.

3. Keep informed about issues affecting the arts and let your legislators know your position on these issues.

4. Become involved with your elected officials. Reinforce the support you receive from your legislators with letters of thanks, awards and campaign support.

5. Understand the legislative process, including the strategic importance of compromise.

6. Alert other advocates to take action on arts-related legislation.

7. Coordinate advocacy with other groups. Build a coalition of arts advocates.

8. Participate in local political events to give visibility to the arts on the public policy agenda.

9. Understand the impact of public arts funding in the community.

10. Provide policy makers with the information they need to make the case. Know the facts, and present the information clearly and succinctly.

NATIONAL ASSEMBLY OF STATE ARTS AGENCIES
ARTS ADVOCACY CHECKLIST
A Self-Evaluation Tool

The Arts Advocacy Checklist is designed to help you evaluate the level of your advocacy involvement against a range of activities aimed at strengthening political support for the arts. The list includes many approaches to advocacy that have contributed to successful outcomes for the arts in policy and legislation. Rate yourself on each question as "Strong" (S); "Adequate" (A); "Weak" (W); or "Nonexistent" (N).

CREATING ACCESS TO POWER

1. Your organization has developed relationships with legislators who are influential on arts policy and budget.

S A W N

2. Your organization arranges for influential constituents who are knowledgeable in the arts to discuss public arts support with their elected officials.

S A W N

3. You consult your friends in the legislature for advice and help with strategy.

S A W N

4. Your organization invites legislators to address your statewide arts conference.

S A W N

5. Your organization invites legislators and other public officials to your arts events.

S A W N

6. Legislators understand how their support for the arts helps them achieve their other legislative goals, in areas like economic growth, educational improvement and community development.

S A W N

7. Legislators announce the grants awarded to their constituents by public arts agencies.

S A W N

8. In an election year, your organization:

•Informs candidates for public office of your positions on arts issues.

S A W N

•Invites candidates to attend your meetings and to speak on the arts.

S A W N

•Makes research and studies on arts issues available equally to political candidates.

S A W N

ENHANCING ADVOCACY SKILLS

1. Your organization makes advocacy an agenda item at every board meeting.

S A W N

2. Your organization:

•Includes advocacy in the job description of every board member.

S A W N

•Recruits board members to work as arts advocates who combine an interest in the arts with political connections.

S A W N

•Trains your board members in advocacy.

S A W N

3. Your organization recruits as advocates:

•Corporate leaders with political contacts who are active in the arts.

S A W N

•Contributors to political campaigns.

S A W N

•Constituents who know their legislators personally.

S A W N

4. To promote an active and informed network of arts advocates, your organization:

•communicates with advocates to keep them current about federal and state legislation affecting the arts.

S A W N

•Distributes an advocacy newsletter column to other organizations in the state for inclusion in their own newsletters.

S A W N

•Convenes arts organizations in the state to discuss legislative issues.

S A W N

•Promotes cooperation on advocacy among arts constituencies.

S A W N

•Provides case-building information on public arts spending to arts constituents.

S A W N

•Promotes advocacy alliances between arts advocates and non-arts advocacy groups with mutual interests.

S A W N

5. Arts organizations in your state credit their public funders to raise the visibility of public arts funding and to let their audiences know the value of public support for the arts.

S A W N

6. Arts advocates conduct a briefing on arts issues for newly elected legislators at the start of the legislative session.

S A W N

7. Arts advocates welcome new legislators to office after an election by writing to offer assistance on questions about arts issues, sending along information about the arts in their communities.

S A W N

8. Arts advocates participate in candidate forums and town meetings, to confront the candidates and ask where they stand on issues of public arts policy.

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Ten Ways to Convert Legislators into Arts Advocates

Typically, most legislators will not have thought much about the arts during the election campaign. But once in office, with the charge to represent their constituents, politicians need to hear from arts advocates so that they will understand the value of the arts in their communities and see the strength of support for the arts from their constituencies.

One

Stand up at election time and begin educating politicians before they take office. Participate in candidate forums, town meetings and "meet and greet" parties in your neighborhood. Confront the candidates. Educate them on the role the arts play in their communities. Ask the candidates where they stand on issues of public arts policy.

Then go another step: **Contribute to the campaigns** of legislators you support and who support the arts. Your financial contributions can help to elect public officials who are advocates for the arts.

Two

Get to know your legislators from the beginning. This might seem simple, but it's essential. Most legislators will be new to the issues of public support for the arts. Some of them will be appointed to committees that handle arts legislation and budgets. It is incumbent upon the advocates—the experts in arts policy—to be available from the beginning of a legislator's career with helpful information and good counsel.

Three

Lead an orientation briefing on state arts issues for legislators and their staff. Familiarize them with the state arts programs, policies, and budgets.

Four

Involve legislators personally with the arts in your state. Invite legislators to performances and exhibitions, and make a point of introducing them and acknowledging their attendance.

Make every arts event an advocacy event. With performances, festivals and exhibitions, the nonprofit arts community serves up what every politician wants: the chance to appear before a group of constituents. Make the opening night, for example, of every performance or exhibition function as an advocacy event as well by inviting a politician to attend.

By attending an arts event, a politician is personally exposed to the importance of an arts organization in the community. The legislator will probably see friends and supporters at the event and realize the arts interest in the community. An invitation to an arts event can help to develop a relationship with the politician. And it is a perfect time to thank the invited officials in public view for their support of the arts.

Five

Provide art for display in legislators' offices. Help them cover the blank walls in their new offices with art and posters from their constituents to emphasize the vitality of the arts in their home communities.

Six

Arrange a meeting for your legislators with the arts leaders in their communities, especially those who are active politically and may likely have contributed to that politician's campaign. Make the connection between the arts constituency and the legislator's friends and supporters in the community.

Seven

Invite a legislator to address a conference on the arts, or to write a column for your newsletter. Your request will force that politician to focus thoughts on your issues and, in the process, become better informed about the arts in your state. Offer exposure through your publication to that senator or representative and build a stronger advocate at the same time.

Eight

Look for a good excuse to contact your legislators, even when you are not asking for something. Send your legislators a copy of your annual report, a guide to your programs, or your calendar of events. Put them on your mailing list. Seize the opportunity to show your legislators what you do and to remind them who you are. This way, you work to establish a relationship for that time when you need something from your legislators.

Nine

Use your politicians as arts presenters. Contact legislators with an offer to bring performing artists or art exhibitions to the state capitol for special occasions. Connect the arts at home with opportunities to present the arts where your legislators work.

Ten

Link public arts funding to other issues in education, social concerns and economic and commercial development. Give a larger dimension to your advocacy for the arts by broadening the discussion to embrace other issues. Demonstrate how the arts can address urban problems, improve performance in other academic subjects, lower school drop-out rates and add to the economy of the state.

Government spending on the arts increases when legislators understand how the arts can help them advance their particular policy agendas. State funding for the arts, and federal arts money too, have increased as advocates have successfully demonstrated the benefits of the arts investment in economic, social and educational terms.

The arts give policy makers the tools for solving problems in creative and cost-effective ways. Advocates can draw on a wealth of research demonstrating the arts' role in improving student learning, in helping to build the economic strength of a community by promoting tourism, and in attracting businesses to expand local job opportunities.

For more resources on building legislative support for the arts, see NASAA's list of advocacy publications, www.nasaa-arts.org/publications/advo.shtml.

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III. Overview of the Legal Framework

This Guide principally addresses two bodies of law that govern ballot measure advocacy by public charities in California—the federal Internal Revenue Code provisions that limit legislative lobbying by public charities, and the California Political Reform Act provisions that require public disclosure of ballot measure campaign financing.

This section starts with a brief overview of the California Political Reform Act and introduces its terminology. A more detailed description of the campaign finance disclosure law appears as Appendix A to this Guide. Next, since many readers will be somewhat familiar with tax restrictions on lobbying by public charities, we give only an extremely broad brush introduction to the tax rules. A more detailed summary of the Internal Revenue Code provisions on legislative lobbying by public charities appears as Appendix B to this Guide. In subsequent sections of the Guide, we apply these two bodies of law to various types of ballot measure activities.

Along with introducing the principal bodies of law covered by this Guide, this section discusses a number of other legal issues that may be relevant to public charities involved in ballot measure work. These include local campaign finance disclosure laws; restrictions on the use of funds imposed by funding sources; restrictions on a public charity's activities contained in its own governing documents; and issues that arise when ballot measure campaigns become intertwined with candidate elections. A detailed discussion of these issues is beyond the scope of this Guide; public charities that spot issues on this list that potentially affect their ballot measure activities should consult legal counsel for more information.

A. The California Political Reform Act

The Political Reform Act, which was adopted through the initiative process in 1974, requires detailed public disclosure of the role of money in California politics. It applies to both state and local elections, and to campaigns for and against both candidates and ballot measures.

In the ballot measure context, the Political Reform Act is a sunshine statute—it requires the public disclosure of contributions and expenditures made to support or oppose ballot measures. The Act does not limit ballot measure spending;[4] California law allows individuals and organizations to spend as much as they choose on ballot measure campaigns as long as they comply with the applicable reporting obligations. Public charities are covered by the Political Reform Act, and may have campaign finance reporting obligations as a result of their ballot measure activities.

[4] There is one exception to this general rule; the Political Reform Act prohibits ballot measure contributions or expenditures by foreign nationals.

Public charities are covered by the Political Reform Act, and may have campaign finance reporting obligations as a result of their ballot measure activities.

In general, charities trigger reporting obligations under the Political Reform Act through three types of activities:

- Making contributions (cash or in-kind) for ballot measure activities of $10,000 or more during a calendar year;
- Receiving contributions for ballot measure activities of $1,000 or more during a calendar year; and
- Making independent expenditures urging voters to adopt or reject a measure of $1,000 or more during a calendar year.

Any group that receives contributions of $1,000 more is called a *Recipient Committee*, and must file campaign finance reports on both the contributions it receives and the contributions and independent expenditures it makes. (Ballot Measure Committees are a type of Recipient Committee.) Organizations that are not Recipient Committees, but have reporting obligations based on the amount of their contributions or independent expenditures, are either *Major Donor Committees* or *Independent Expenditure Committees*. All campaign finance reports are public documents, accessible to anyone.

Contribution has a broad and multi-faceted meaning under the Political Reform Act. It can mean a transfer of money or property for the purpose of supporting or opposing a ballot measure, or with the knowledge that the transferred money will be used for that purpose. It can also mean the provision of staff, office space, mailing lists, poll results, or other resources to a Ballot Measure Committee, or payments for activities that are done at the behest of or in coordination with a Ballot Measure Committee.

An *independent expenditure* is a payment for a communication to the public that expressly or unambiguously advocates the qualification, passage, or defeat of a ballot measure, and which is not made at the behest of or in coordination with a Ballot Measure Committee.

Further Information

A more detailed description of the Political Reform Act provisions applicable to public charities appears as Appendix A to this Guide.

In this Guide, we use the term "contribution" only for payments that meet the definition of a contribution for ballot measure activities under the Political Reform Act; similarly, the term "independent expenditure" is used only as it is used in the Act, to describe payments for communications urging voters to adopt or reject a measure. Together, making contributions, receiving contributions, and making independent expenditures are reportable *ballot measure activities*, i.e., activities that have to be reported in campaign finance disclosure filings if the applicable dollar thresholds are met.

B. Federal Tax Law

Ballot measures are considered to be legislation for tax purposes, and encouraging voters to cast their votes for or against a ballot measure is treated as lobbying. All public charities are permitted to engage in lobbying activities, although Section 501(c)(3) limits the amount of lobbying public charities can do. As long as they observe the Section 501(c)(3) limits on the amount of their lobbying, all public charities may endorse or oppose ballot measures and urge voters to pass or defeat measures without jeopardizing their exempt status.

As long as they observe the Section 501(c)(3) limits on the amount of their lobbying, all public charities may endorse or oppose ballot measures and urge voters to pass or defeat measures without jeopardizing their exempt status.

How much lobbying a public charity may do is determined under one of two tests, and nearly all[5] public charities can choose which of the tests will apply. By filing a one-page form with the IRS, a public charity can elect to have the amount of its permissible lobbying measured under the Section 501(h) expenditure test. Charities that make the Section 501(h) election (which we call *electing public charities*) may lobby freely as long as the amount of money they spend on lobbying communications does not exceed certain spending caps, which are calculated based on the charity's budget. Public charities that do not make a Section 501(h) election (or *non-electing charities*) are governed by the more nebulous "no substantial part" test, meaning that their lobbying activities cannot amount to a substantial part of their overall activities.

Under Section 501(h), one spending cap applies to overall lobbying expenditures; a second and much lower cap applies to expenditures for "grassroots" lobbying.[6] Any communication made to legislators which refers to and reflects a view on legislation is treated as direct lobbying for tax purposes. Under a special rule for ballot measures, the IRS treats the public as the legislature, so that nearly all lobbying on ballot measures is considered direct lobbying under Section 501(h), rather than grassroots lobbying.

Lobbying on ballot measures is considered direct lobbying under Section 501(h), rather than grassroots lobbying.

A communication to members of the public which refers to a ballot measure and reflects a view on the measure is likely to be lobbying for tax purposes. However, there are important exceptions and nuances to this lobbying definition, especially for charities who have made the Section 501(h) election. The dissemination of

[5] Some public charities, like churches, are not eligible to make a Section 501(h) election; their lobbying is always restricted under the "no substantial part" test. *See* IRC Section 501(h)(3), (4).

[6] As of December 16, 2003, legislation was pending in both houses of Congress (H.R. 7 and S. 476) to that would eliminate this separate and lower limit for grassroots lobbying. If enacted into law, these measures would provide that only one limit, for the total amount of direct and grassroots lobbying, would apply to the lobbying activities of electing public charities.

nonpartisan research, study, and analysis is not considered lobbying for tax purposes, for example. At least for electing charities, neither are public education campaigns about issues addressed by ballot measures that do not refer to the measure, or the distribution of neutral and unbiased information about a measure that does not reflect a view.

Lobbying expenditures include not only the costs to deliver or distribute lobbying communications, but also the costs to research and prepare them.

All public charities must report the amount of their lobbying expenditures on their annual federal tax return, Form 990. Lobbying expenditures include not only the costs to deliver or distribute lobbying communications, but also the costs to research and prepare them, including the full costs of staff time and a reasonable allocation of overhead, as well as out-of-pocket payments. Charities that do not make a Section 501(h) election must also attach a detailed narrative statement to IRS Form 990 describing their lobbying activities.

C. Local Campaign Finance Ordinances

The campaign finance reporting requirements of the California Political Reform Act apply to both state-wide propositions and local ballot measures at the city or county level. However, some California cities and counties have additional campaign finance laws that apply to campaigns for or against ballot measures in that jurisdiction. For example, San Francisco and Los Angeles both have local laws that apply to local ballot measure campaigns.

This Guide does not cover any local campaign finance laws. Charities that are considering getting involved in a local ballot measure should investigate whether local campaign finance laws will apply to their activities in additional to the Political Reform Act.

Further Information

More information about the tax rules relating to lobbying by Section 501(c)(3) public charities appears in Appendix B to this Guide. In addition, the Alliance for Justice publishes a number of booklets that explain the federal tax law rules on lobbying by Section 501(c)(3) public charities in greater detail. These and other resources on public charity lobbying are listed in Appendix C to this Guide.

D. State Tax Law

Charitable organizations in California that are exempt from federal tax under Section 501(c)(3) of the Internal Revenue Code are typically exempt from state income taxes under Section 23701d of the California Revenue & Tax Code. The state tax rules regarding lobbying by public charities parallel the federal rules, so lobbying that is permissible under Section 501(c)(3) is also consistent with an organization's California tax-exempt status. The California Franchise Tax Board has slightly different reporting requirements, however. California charities must report their lobbying activities on FTB Form 3509, including a narrative description of their lobbying activities,

a schedule of expenditures, and copies of any materials published.[7]

E. Limits on Lobbying Imposed by Funding Sources

Grants or gifts made to charitable organizations often come with their own set of restrictions and limits. In determining whether to engage in ballot measure activities, a public charity must ascertain which funds it may use for this purpose.

Federal grant funds cannot be used to lobby for or against ballot measures, under rules enforced by the Office of Management and Budget. (These rules are described in OMB Circular A-122.) State and local government grants and contracts may also come with prohibitions on use of government funds for lobbying. In addition, grants received from other charitable organizations, especially private foundations, may restrict the use of grant funds for lobbying; more rarely, individual gifts may also include lobbying restrictions.

For any potential source of funds for ballot measure activity, a charity should check correspondence to determine whether funds from that source may be used for the proposed activity.

For any potential source of funds for ballot measure activity, a charity should check the contract, grant agreement, or donor correspondence as appropriate to determine whether funds from that source may be used for the proposed activity. Note that restrictions imposed by funding sources on the use of funds, including specifically those imposed in Federal grants, generally apply only to money received from that source, and not to other resources of the charity obtained from other donors or grantors.

Gifts, grants, and contracts made to charitable organizations may also be restricted to fund only specified purposes or activities, like providing childcare services or public education about water policy. These restrictions must also be observed in determining whether a source of funds exists for the proposed ballot measure activity.

F. Limits in the Public Charity's Governing Documents

Organizations that are exempt from tax under Section 501(c)(3) are either nonprofit corporations, trusts, or unincorporated associations. (Most California-based charities are nonprofit public benefit corporations.) In each case, the nonprofit organization has governing documents that set forth its purposes and limit its activities. A nonprofit corporation has Articles of Incorporation and Bylaws, for example, while a trust has a Trust Agreement or Declaration of Trust. These governing documents may include limits on political and legislative activity that are more stringent than those required by the Internal Revenue Code; a charitable organization should therefore check its own governing documents to determine whether they permit ballot measure lobbying or other ballot measure activities. In some cases, it may be possible to amend the

[7] In practice, the FTB will generally accept forms that report only the total amounts of direct and grassroots lobbying, with a simple statement that further information will be provided on request.

governing documents to eliminate unnecessarily strict lobbying limits. If so, such amendments should be made before the charity engages in any lobbying activity.

G. Candidate Issues

Ballot measure campaigns can sometimes become intertwined with candidate elections. If a particular ballot measure becomes closely identified with one candidate or political party, or if a candidate or party controls the committee promoting or opposing a measure, Section 501(c)(3) organizations must take extra care in planning and documenting their own activities to prevent any appearance of intervening in the candidate election, since electioneering with respect to candidates is strictly prohibited for Section 501(c)(3) organizations. While this concern should not prevent public charities from supporting or opposing ballot measures, nonprofit counsel should be consulted before proceeding if there appears to be any risk that a charity's ballot measure activities could be interpreted by its opponents as supporting, opposing, or assisting any candidate for public office.

If a particular ballot measure becomes closely identified with one candidate or political party, or if a candidate or party controls the committee promoting or opposing a measure, Section 501(c)(3) organizations must take extra care in planning and documenting their own activities to prevent any appearance of intervening in the candidate election.

In some circumstances, lobbying can be a form of partisan political activity to influence candidate elections. For example, when lobbying efforts are targeted to the district where an election is taking place, timed to coincide with a contested election, and focused on wedge issues that distinguish the candidates, the lobbying efforts may be interpreted as campaign intervention. Again, consult nonprofit counsel before proceeding if a charity's lobbying efforts could be construed as an effort to sway the outcome of a candidate election.

Also, mentioning candidates or elected officials in communications about ballot measures, or coordinating activities with candidates or elected officials, can sometimes implicate federal or state campaign finance laws. Campaign finance laws related to candidates are beyond the scope of this Guide, but any charity that considers referring to a candidate (or elected official running for re-election) in mass media advertising should consult election law counsel before proceeding.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

JUN 26 2000

Charity Lobbying in the Public Interest, a Project of
Independent Sector
2040 S Street, NW
Washington, DC 20009

Dear Sir or Madam:

This is in response to a letter, dated April 18, 2000, submitted on your behalf by your attorneys, in which you request information on questions related to lobbying by publicly supported charitable organizations recognized as exempt from federal income tax because they are described in section 501(c)(3) of the Internal Revenue Code. Your questions and our responses are set forth below.

1. Is lobbying by section 501(c)(3) organizations permissible under federal tax laws?

Yes (except for private foundations under most circumstances).

2. How much lobbying may a "public charity" (a section 501(c)(3) organization other than a private foundation or an organization testing for public safety) conduct?

There are two sets of rules, and with the exception of churches, public charities can choose which set to follow. One rule is that no substantial part of the organization's activities can be lobbying. The alternative rule, that an organization must affirmatively elect, provides for sliding scales (up to $1,000,000 on total lobbying and up to $250,000 on grass roots lobbying) that can be spent on lobbying. (The scales are based on a percentage of the organization's exempt purpose expenditures.)

3. What are the advantages and disadvantages of the two options?

Organizations covered by the "no substantial part" rule are not subject to any specific dollar-base limitation. However, few definitions exist under this standard as to what activities constitute lobbying, and difficult-to-value factors, such as volunteer time, are involved.

Organizations seeking clear and more definite rules covering this area may wish to avail themselves of the election. By electing the optional sliding scale, an organization can take advantage of specific, narrow definitions of lobbying and clear dollar-based safe harbors that generally permit significantly more lobbying than the "no substantial part" rule. However, as noted above, there are ceilings (unadjusted for inflation) on the amount of funds that can be spent on lobbying. Thus, these dollar limits should be considered when making the election.

4. How does a public charity elect? May an election be revoked?

The organization files a simple, one-page Form 5768 with the Internal Revenue Service. The election only needs to be made once. It can be revoked by filing a second Form 5768, noting the revocation.

5. Does making the election expose the organization to an increased risk of an audit?

No. The Internal Revenue Manual specifically informs our examination personnel that making the election will not be a basis for initiating an examination.

6. Does the Internal Revenue Code allow public charities that receive federal grant funds and contracts to lobby with their private funds?

Yes. However, while it is not a matter of federal tax law, it should be noted that charities should be careful not to use federal grant funds for lobbying except where authorized to do so.

7. May private foundations make grants to public charities that lobby?

Yes, so long as the grants are not earmarked for lobbying and are either (1) general purpose grants, or (2) specific project grants that meet the requirements of section 53.4945-2(a)(6) of the Foundation Excise Tax Regulations.

8. May section 501(c)(3) organizations educate voters during a political campaign?

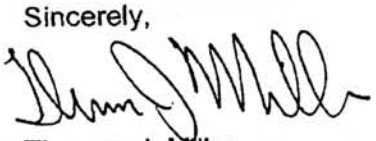
Yes. However, organizations should be careful that their voter education efforts do not constitute support or opposition to any candidate.

9. May public charities continue to lobby incumbent legislators even though the legislators are running for reelection?

Yes. Charities should be careful, however, to avoid any reference to the reelection campaign in their lobbying efforts.

If you have any further questions, please feel free to contact me at (202) 283-9472, or John F. Reilly, Identification Number 50-05984, of my office at (202) 283-8971.

Sincerely,



Thomas J. Miller
Manager, Exempt Organizations Technical

cc: Mr. Thomas A. Troyer
Caplin & Drysdale, Chartered
1 Thomas Cir., N.W.,
Washington, D.C. 20005

cc: Mr. Marcus S. Owens
Caplin & Drysdale, Chartered
2005 Thomas Cir., N.W.
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Ballot Measures at the Intersection

These simplified examples illustrate the intersection between federal tax and California campaign finance laws. Each example is discussed in detail in The Public Charity's Guide to the California Initiative Process.

California Political Reform Act	Federal Tax Law - Section 501(h): Not Lobbying	Federal Tax Law - Section 501(h): Lobbying
Not Reportable	Public education campaigns that don't reflect a view on a measure (and are not coordinated)* Nonpartisan analysis, study, or research that doesn't expressly advocate for / against a measure (and is not coordinated)* Post-passage monitoring, evaluation, advocacy regarding implementing regulations, or litigation	Spending less than $1,000 in a year to expressly urge voting for / against ballot measures Stating a view on ballot measures without urging voters to take action (and without coordination) Contributing less than 10% of a paid staffer's time in any month to a Committee Drafting proposed language for a ballot measure
Reportable	Public education campaigns that don't refer to a measure, or don't reflect a view, but are coordinated with a Committee Nonpartisan analysis, study, or research with a statement urging voters to support / oppose a ballot measure*	Spending $1,000 or more in a year to expressly urge voting for / against a ballot measure (or to urge signing / not signing a petition to qualify a measure) Contributions of money, substantial staff time, office space, or other resources to a Committee Preparing, before a measure is in circulation or on the ballot, for later express advocacy communication about the measure

*For non-electing charities, it is possible these activities may be considered lobbying under some circumstances; the determination is based on all relevant facts, including the charity's intentions. Non-electing charities may not rely on the definitions provide under Section 501(h)

Appendix A:
The California Political Reform Act

The Political Reform Act, which was adopted through the initiative process in 1974, requires detailed public disclosure of the role of money in California politics. It applies to both state and local elections, and to campaigns for and against candidates and, more importantly for charities, ballot measures. The California Fair Political Practices Commission (FPPC) is the state agency charged with the principal responsibilities for interpreting, implementing, and enforcing this campaign finance law, though many campaign disclosure reports are filed with (and made available to the public by) the California Secretary of State.

In the ballot measure context, the Political Reform Act is a sunshine statute—it requires disclosure of contributions and expenditures made to support or oppose ballot measures. The Act does not limit ballot measure spending[15]; California law allows individuals and organizations to spend as much as they choose on ballot measure campaigns as long as they comply with the applicable reporting and other disclosure obligations.

In general, reporting obligations are triggered under the Political Reform Act by three types of activities:

- Making contributions for ballot measure activities of $10,000 or more during a calendar year;
- Receiving contributions for ballot measure activities of $1,000 or more during a calendar year; and
- Making independent expenditures urging voters to adopt or reject a measure of $1,000 or more during a calendar year.

Individuals or organizations that pass any one of these three milestones are considered "Committees" under the Act, and must file public campaign finance disclosure reports.

The definitions of *contribution* and *independent expenditure* under the Political Reform Act are discussed in more detail below.

In this Guide, we use the term "contribution" only for payments that meet the definition of a contribution for ballot measure activities under the Political

[15] There is one exception to this general rule; the Political Reform Act prohibits ballot measure contributions or expenditures by foreign nationals.

Reform Act; similarly, the term "independent expenditure" is used only as it is used in the Act, to describe payments for communications urging voters to adopt or reject a measure. Together, making contributions, receiving contributions, and making independent expenditures are *reportable ballot measure activities*, i.e., activities that have to be reported on forms filed with the Secretary of State and other filing officials if the applicable dollar thresholds are met.

If a public charity does make contributions or independent expenditures for ballot measure activities, a key question is whether the charity will be required to disclose its sources of funding for those activities—its donors and grantors, in other words—in its own campaign finance reports. This often complex question is discussed below under "Reporting of Funding Sources."

The Political Reform Act also mandates that ballot measure advertisements include a disclosure statement that indicates who is paying for the ads. Disclosure rules also apply to broadcast advertisements or mass mailings for or against ballot measures that are independent expenditures. In addition, other types of communications may be required to include a statement about funding sources if the Committee paying for them has received $50,000 or more from a single contributor. These disclosure rules are beyond the scope of this Guide.

A. Key Definitions and Concepts

Understanding the campaign finance disclosure rules begins with the definitions of the key terms.

In general, reporting obligations are triggered under state campaign disclosure laws by making contributions to ballot measure campaigns, receiving contributions for ballot measure campaigns, and making independent expenditures urging voters to adopt or reject a measure.

Contribution. The term *contribution* has a broad and multi-faceted meaning under the Political Reform Act and the regulations interpreting it. Because the meaning of this term is pivotal to the Act's disclosure scheme, it merits close attention by public charities involved in ballot measure advocacy.[16]

The basic definition of a contribution is a payment to any person or organization for the purpose of influencing either the qualification of a measure for the ballot or the passage or defeat of a ballot measure. Hence, if someone makes a donation to a charity for the specific purpose of supporting the charity's efforts to oppose a particular ballot measure, or in response to a solicitation from the charity

[16] As this Guide went to press, litigation was underway between the FPPC and the American Civil Rights Coalition, Inc. regarding when donations to a nonprofit organization should be treated as reportable ballot measure contributions. The outcome of this case may affect the definition of a contribution under the Political Reform Act and FPPC regulations implementing the Act.

asking for such support, the donor has made a contribution and the charity has received a contribution.

However, the donor's intentions are not always determinative; it is also a contribution to transfer money or property if, at the time of making the payment, the donor knows or has reason to know that the payment (or funds with which the payment will be commingled) will be used to make ballot measure contributions or expenditures. For example, if an organization's fundraising letter indicates an intention to use the donations raised for ballot measure expenditures, a supporter who donates in response to the letter will be deemed to have made a reportable contribution, since he or she had reason to know the charity would use the contribution for ballot measure activity. This is also the case if conversations with representatives of the charity have given the donor reason to expect that the gift will be used for ballot measure activity. If the donor knows or has reason to know that only a part of the donation will be used to make contributions or expenditures, the donated amount is apportioned on a reasonable basis to determine the amount that will be deemed to be a contribution.

Whether a donor knows or has reason to know that the donation will be used for reportable ballot measure activity depends on the circumstances. If the charity receiving the donation has not made ballot measure contributions or independent expenditures of at least $1,000 or more in the current calendar year or in any of the preceding four calendar years, a presumption arises that the donor did not have reason to know that the donation would be used for ballot measure activity. (However, this favorable presumption goes away if there is evidence that the donor did have actual knowledge of the charity's intention to use the gift for ballot measure activity.)

Any payment made to an organization formed or existing primarily for political purposes—that is, formed primarily to support or oppose candidates or ballot measures—is treated as a contribution unless full and adequate consideration is received in return. Thus, all donations to Ballot Measure Committees are treated as contributions, regardless of what the donor knows or intends regarding the Committee's use of the funds. Also, making bargain sales to Ballot Measure Committees or offering discounts that are not available to the public are treated as contributions. Payments made "at the behest of" a Ballot Measure Committee also are contributions, as discussed further below.

If a gift is made to a person or organization other than a Ballot Measure Committee, and the donor expressly restricts the use of the donation so that it is clear that the funds may not be used to make independent expenditures or contributions for ballot measure (or candidate) campaigns, the gift will not be treated as a contribution. This is true even if the recipient subsequently engages in ballot measure activities.

Contributions include not only outright monetary donations, but also loans, pledges of future financial support, or the provision of in-kind goods or services.

For example, donating a mailing list and address labels to a Ballot Measure Committee would be a contribution (with the value of the contribution measured by the fair market value of the list and labels). Providing office space is also a contribution, again measured by the fair market value of the office space provided. Lending paid staff to a Ballot Measure Committee is a contribution if a staff member spends 10 percent or more of his or her compensated time during a calendar month working on behalf of the committee.

At the behest of. Any payments made "at the behest of" a Ballot Measure Committee are considered contributions to the Committee. Expenditures are made *at the behest* of a Ballot Measure Committee if they are made at the direction of; in cooperation, consultation, coordination, or concert with; at the request or suggestion of; or with the express prior consent of the Committee or any of its agents. Generally, an expenditure is presumed to be made at the behest of a Committee if the expenditure is based on information provided by the Committee or its agents about the Committee's needs or plans, or if the expenditure is made by or through the Committee or its agents. With respect to public communications in particular, an expenditure for such a communication is presumed to be made at the behest of the Committee if the Committee or its agents have made or participated in making decisions concerning, or substantially discussed with the expending party, the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement, of the communication. In-kind contributions do not have to relate to public communications; for example, a payment for consulting services may be an in-kind contribution if it is made at the behest of a Committee, even if the consulting does not result in a public communication.

Under this broad definition, a charity can be deemed to have made a contribution to a Ballot Measure Committee if it undertakes an activity that is coordinated with the Committee. For example, if a charity distributes a research report that was planned in coordination with a Ballot Measure Committee, the charity has likely made a contribution to the Committee. Expenditures that are contributions because they were made at the behest of a Committee are often referred to simply as *coordinated* expenditures.

A charity can be deemed to have made a contribution to a Ballot Measure Committee if it undertakes an activity that is coordinated with the Committee.

Due to the breadth of the concept of coordination, it may be advisable in some circumstances for charities involved in ballot measure issues to avoid using the same consultants as a Ballot Measure Committee. It is possible, for example, that using the same communications firm to design and implement a nonpartisan public education campaign on the topic of a ballot measure that the Committee is using for its campaign ads could cause the nonlobbying education efforts to be treated as an in-kind contribution to the Committee.

Independent expenditure. An *independent expenditure* is a payment for a communication to the public which expressly advocates the qualification, passage, or defeat of a ballot measure, and which is not made at the behest of a Ballot Measure Committee (i.e., it is not a contribution).

An independent expenditure meets all three of the following elements:

- The expenditure is for a *communication* to the public, which can take any form (including mail, e-mail and any other Internet communications, radio, television, billboards, door hangers, and flyers).
- The communication includes *express advocacy* of the qualification, passage or defeat of a ballot measure (e.g., Vote against 99, Reject Prop. A, Support Measure C); and
- The communication is *independent*, meaning it is not made "at the behest of" the Ballot Measure Committee or its agents (see additional discussion above).

What constitutes "express advocacy" in the context of campaign communications has been the subject of substantial discussion, regulatory action, and litigation. The two basic elements are a clear reference to the measure, and a call to action by the voters. The use of specific words of advocacy such as "vote for," "support," "cast your ballot," "vote against," "defeat," "reject," and "sign petitions for" clearly qualifies as express advocacy. Whether more ambiguous words qualify as "express advocacy" must be analyzed on a case-by-case basis with reference to all aspects of the communication; the most recent court decisions strongly suggest that the types of unambiguous words cited above are essential, and more ambiguous statements do not qualify as express advocacy. For instance, "Measure A is bad public policy" alone is probably not express advocacy but "Measure A is bad public policy – don't forget to vote on Tuesday" may cross the express advocacy line. On this issue, a careful legal review of any public communications is highly recommended.

***Committee*.** Any individual or organization that makes contributions of $10,000 or more during a year, receives contributions of $1,000 or more during a year, or makes independent expenditures of $1,000 or more during a year is considered a *Committee* under the Act. If a public charity crosses one of these contribution or independent expenditure thresholds, the charity will be a Committee for campaign finance purposes. The various types of Committees, and their reporting obligations, are discussed below under "Reporting Obligations under the Political Reform Act."

Measure. A *measure* is any constitutional amendment or other proposition which is submitted to a popular vote at an election by action of a legislative body, or which is submitted or is intended to be submitted to a popular vote at an election by initiative, referendum or recall procedure, whether or not it qualifies for the ballot.

For a measure placed on the ballot by a legislative body, the proposal does not become a "measure" until the legislative body votes to place it on the ballot. Consequently, expenditures in support of the proposal prior to that time are not usually subject to campaign reporting requirements.[17]

For a measure placed on the ballot through the petition process, the proposal does not become a measure for reporting purposes until the signature gathering process begins.

Note, however, that payments made prior to a proposal becoming a measure may be reportable if they are made to directly support the qualification of the measure for the ballot, or the campaign for or against the measure, or are used or relied on in the qualification or campaign process. For example, if a poll is conducted before a proposal becomes a measure which tests possible campaign messages, and the poll results are later relied on in crafting the message appearing in campaign communications on the measure, then the payment for the poll will likely be an in-kind contribution to the Ballot Measure Committee when the results are used.

B. Reporting Obligations under the Political Reform Act

Any individual or entity that meets the definition of a "committee" is required to file campaign finance disclosure reports; the types of committees most relevant to charities involved in ballot measure campaigns are discussed below. While the Fair Political Practices Commission is the agency that interprets and enforces the Political Reform Act, disclosure reports are filed with (and made publicly available by) the California Secretary of State. In addition, reports may have to be filed with county clerks in some circumstances.

This Guide does not cover the details of campaign finance reporting obligations; rather, its purpose is to explain when a charity may have reporting obligations. Legal counsel experienced with Political Reform Act reporting should be consulted if a charity thinks it may have a reporting obligation.

Recipient Committees. Any person or organization that receives contributions of $1,000 or more in a calendar year for the purpose of influencing California state or local elections is considered to be a *Recipient Committee*. Recipient Committees must file an initial notice within 10 days of meeting the definition of a Recipient Committee (or, if it qualifies shortly before an election, within 24 hours of meeting the definition). Recipient Committees must also file periodic campaign finance reports disclosing the contributions they receive, and all the contributions and independent expenditures they make, to support or oppose a

[17] However, California law imposes registration and reporting requirements on direct lobbying of the legislative branch which may apply depending on the nature and extent of lobbying contacts made, and which are beyond the scope of this Guide.

measure. The frequency with which reports are due varies depending on the length of time before an election; in the weeks just before election day, some contributions and expenditures must be reported within 24 hours.

Recipient Committees are required to disclose the name and address (and for individual donors, the occupation and employer) of any contributor who gives aggregate contributions during the year of $100 or more. If this donor information is not obtained, the Recipient Committee is required by law to return the contribution. Contributions of less than $100 from a single donor do not need to be individually listed in campaign finance disclosure reports. In-kind contributions and loans are listed along with monetary contributions.

If a Recipient Committee obtains a contribution through an intermediary, it must disclose the name, address, occupation, and employer of both the original donor and the intermediary who delivers it to the Committee.

If a Recipient Committee receives contributions of $5,000 or more during a calendar year from a single donor, it must notify that donor that the donor may its own have reporting requirements as a "Major Donor Committee." (The Major Donor Committee requirements are discussed below). The notice must be in writing and must include specific language approved by the FPPC.

Recipient Committee reports also include itemized lists of payments of $100 or more made during the reporting period, loans made and received, payments made on behalf of the Committee by agents or independent contractors, and accrued (i.e., unpaid) expenses. For entities that qualify as a Recipient Committee but also engage in activities unrelated to elections, the Recipient Committee reports only cover the income, expenses, and activities attributable to their reportable ballot measure activity.

Some Recipient Committees are formed for the express and only purpose of supporting or opposing candidates and ballot measures. These are called "primarily formed" committees and are subject to additional reporting, naming, and disclaimer requirements. In this Guide, we refer to Committees that are primarily formed to support or oppose a single ballot measure as a "Ballot Measure Committee." Often Recipient Committees are "sponsored" by a group or coalition of other persons or organizations, or "controlled" by a candidate or officeholder. Special reporting requirements apply to these types of Recipient Committees.

***Independent Expenditure Committees*.** Any person or organization who is not a Recipient Committee (because it does not receive $1,000 in contributions during the year) but makes independent expenditures of $1,000 or more during the calendar year with its own money, is an *Independent Expenditure Committee*. An Independent Expenditure Committee must file periodic campaign disclosure reports listing the independent expenditures it makes. The frequency with which reports are due varies depending on the length of time before an election; in the weeks just

before election day, some independent expenditures must be reported within 24 hours.

Major Donor Committees. Any person or organization who is not a Recipient Committee (because it does not receive $1,000 in contributions during the year) but makes contributions to candidates or Committees of $10,000 or more during the calendar year with its own money is a *Major Donor Committee*, and must file periodic campaign finance reports disclosing the contributions it makes. In the 16 days prior to election day, some contributions must be reported within 24 hours. A person or organization can become a Major Donor Committee as a result of a single large reportable contribution to a single Recipient Committee, or through a series of smaller reportable contributions to several different Recipient Committees made in a single year.

C. Reporting of Funding Sources

When a public charity makes contributions or independent expenditures for ballot measure activities, a key question is whether the charity will be required to disclose the source of its funds—i.e., to name its donors—in its own campaign finance reports. In other words, the public charity must determine whether it is a Recipient Committee that received and spent contributions for reportable ballot measure activities, or whether it is a Major Donor or Independent Expenditure Committee that engaged in ballot measure activities with its "own" money.

This determination can be complex and is highly dependent on the specific facts of a particular situation. Also, as of this writing, there is litigation underway between the FPPC and a nonprofit organization that may shed additional light on when organizations must file Recipient Committee reports disclosing the names of their donors.[18] The outcome of this case could affect the reporting obligations of charities. In this section, we look at some general principles that apply when a donor transfers money to an organization, like a public charity, who may be involved in ballot measure activity but is not a Ballot Measure Committee, candidate committee, or political action committee.

Gift for a project intended to be reportable campaign activity. If a donor makes a gift or grant to a public charity with the direction, agreement or understanding (explicit or implicit) that the funds will be used for reportable ballot measure activity, the gift or grant will be a reportable contribution. Thus, if a donor agrees to fund a particular project, and the project the donor agreed to support constitutes reportable campaign activity, then the donor will be treated as having made a contribution and the charity will be treated as having received a contribution. (If the donor goes beyond providing financial support, and actually participates in decisions concerning the reportable activity, the donor may also be

[18] This litigation is between the FPPC and the American Civil Rights Coalition, Inc. The FPPC alleges that the Coalition must file Recipient Committee reports disclosing its donors, but the Coalition has challenged both the FPPC rules and the application of the rules to its circumstances and facts.

considered a sponsor of a Recipient Committee and have additional reporting requirements.)

Gift for a project that, as implemented, includes reportable activity. The situation is somewhat different if the donor agrees to fund a particular project of a public charity without knowing or agreeing to the aspects of the project that make it reportable campaign activity. The donor may still be deemed to have made a reportable contribution to the organization if the donor knew or should have known that the donation would be used for reportable activity by the public charity. Reporting obligations in this case would depend on a fact-specific inquiry to determine if the donor had the requisite knowledge to cause the donation to be treated as a contribution within the meaning of the campaign reporting laws. Relevant facts will include the description of the funded project, the statements in the solicitation and award documents, discussions between the donor and the charity about the project, involvement of the donor in implementation, and the charity's history of ballot measure activity generally.

Gift for a project that includes no reportable activity. If a donor makes a gift or grant to an organization with the agreement or understanding that the funds will be used for a particular project, and the project includes no reportable activities (i.e., no independent expenditures or ballot measure contributions, in cash or in kind), then the donation will not be reportable. This is true even if the organization engages in reportable activity with other funds.

Unrestricted donation to an organization that engages in reportable ballot measure activities. If a public charity engages in reportable ballot measure activity, and the charity pays for the activity with donated funds, it could meet the definition of a Recipient Committee. If so, it will have to report the contributions it receives to fund its ballot measure activities, as well as its expenditure for those activities.

A threshold question is whether the public charity can identify a source of funds other than grants and donations for its ballot measure activities. If the public charity can identify another source of funds, such as earned income or investment income, it usually will not have to disclose its donors.

If the public charity cannot identify a source of funding other than grants or donated funds for its ballot measure activity, the charity will have to assess whether particular grants or donations it received meet the definition of a "contribution" within the meaning of the campaign disclosure laws. The broad meaning of "contribution" is discussed above. As applied to a charity that receives charitable gifts, donation made with the direction, agreement, or understanding (explicit or implicit) that the public charity will use the donated funds to engage in the reportable ballot measure activity is a reportable contribution.

But even if the donor did not direct that the donation be used for reportable ballot measure activity, and even if there was no agreement or understanding

between the charity and the donor regarding how the funds will be used, a donation can still be treated as a contribution under the Political Reform Act if the donor knew or had reason to know that the payment (or funds with which the payment will be commingled) would be used for ballot measure activity. A charity's history of ballot measure activity is one important factor in determining whether donors will be deemed to have made contributions, since that history may give donors a reason to know their donations could be used for reportable ballot measure activities. It is not the only factor, though, since a charity's correspondence or statements to donors also could give donors a reason to know that their contribution would be used for ballot measure activity.

Reporting donors as a Recipient Committee. If a public charity receives $1,000 or more in contributions during a calendar year and thus qualifies as a Recipient Committee, it will have to allocate its reportable ballot measure expenses to the donations available to fund them. To give an example, if a charity determines it is a Recipient Committee, and that it had $100,000 in donations available to fund its $15,000 in independent expenditures, the charity would treat 15% of each available donation as a contribution, reporting the names of all donors deemed to have contributed $100 or more. For example, a donor who gave $500 to the charity would not be identified by name, address, occupation, and employer, because the donor's deemed contribution (calculated as 15% of $500) is only $75, less than the threshold for naming contributors. A donor who gave $700 would be identified, though, since the deemed contribution (15% of $700) is $105 and passes the threshold for naming donors. In making this calculation, the public charity would exclude all unavailable donations. Gifts or grants are unavailable for ballot measure activity if they were earmarked by the donor for specific projects that are not reportable ballot measure activity, of if the donors prohibited use of their funds for reportable ballot measure activity.

If a donor is treated as making a contribution of $100 or more, the public charity will identify the donor in its Recipient Committee report. Donors who are deemed to have contributed less than $100 from a single source do not need to be listed individually. In some circumstances, contributions from individuals and entities they control must be aggregated. A Recipient Committee must notify donors that they have been reported as contributors if the amount of the contribution attributed them is $5,000 or more.

Appendix B:
Federal Tax Rules

Ballot measures are considered legislation for federal tax purposes, and encouraging voters to cast their votes for or against a ballot measure is treated as lobbying. Therefore, public charities must understand the tax rules concerning legislative lobbying to understand the limits on their permissible ballot measure activities. This Appendix provides an overview of the tax rules, with an emphasis on their application to ballot measures. More information about public charity lobbying may be found in the resources listed in Appendix C.

Ballot measures are considered legislation for federal tax purposes, and encouraging voters to cast their votes for or against a ballot measure is treated as lobbying.

A. 501(c)(3) Lobbying: Three Sets of Rules

With respect to lobbying, the Internal Revenue Code divides the universe of Section 501(c)(3) organizations into three groups, each subject to a different set of rules: electing public charities, non-electing public charities, and private foundations. Although this Guide focuses on public charities, organizations that receive private foundation funding also need to be aware of the lobbying rules applicable to their funders, so the private foundation rules are mentioned below.

Almost all public charities that consider engaging in lobbying have a choice to make. They can file an election under Section 501(h) of the Internal Revenue Code to have the scope of their permissible lobbying activities determined under an expenditures test; or, if no 501(h) election is made, they will be governed by the "no substantial part" test.

Non-electing public charities. Public charities that cannot[19] or do not make the Section 501(h) election are *non-electing public charities* governed by the "*no substantial part" test*. This test arises from language in Section 501(c)(3) itself, which states an organization will be eligible for tax-exempt status under Section 501(c)(3) only if "no substantial part" of the organization's activities consists of influencing or attempting to influence legislation.

There is no clear legal standard establishing how much lobbying is allowed before attempting to influence legislation will be considered a substantial part of an

[19] Some public charities, like churches, are not eligible to make a Section 501(h) election; their lobbying is restricted under the "no substantial part" test. *See* IRC Section 501(h)(3), (4).

organization's activities. The few court cases interpreting the "no substantial part" test have established that substantiality is not a strict percentage test, where up to x% is permissible, but anything more than x% is not.[20] Rather, the test considers all facts and circumstances bearing on whether lobbying activity is substantial, including not only the percentage of spending devoted to lobbying, but also Board and volunteer time, statements by representatives of the organization, the importance of the legislative activity to the organization's mission, and even perhaps the public image that the organization projects. In addition, there is no precise definition of exactly what constitutes "attempting to influence legislation" under the "no substantial part" test.

Electing public charities. For public charities that make the Section 501(h) election by filing a one-page form with the IRS, the scope of their permissible lobbying activities is determined by an expenditure test described in Sections 501(h) and 4911 of the Internal Revenue Code, and roughly 45 pages of implementing IRS regulations. Collectively, we call these laws and regulations the "Section 501(h) rules." Section 501(h) is an exception to the "no substantial part" test.[21]

The Section 501(h) rules impose an annual dollar limit on the electing charity's overall lobbying expenditures. A second, more stringent annual dollar limit applies to the charity's "grassroots" lobbying expenditures.[22] Both the overall and the grassroots lobbying limits are calculated as a sliding percentage of the organization's total exempt-purpose expenditures. For charities with exempt-purpose expenditures of $500,000 or less, the overall lobbying limit is 20% of their exempt-purpose expenditures; the percentage is lower for larger organizations. The lobbying ceiling is capped at $1 million per year, regardless of the size of the organization. Because the 501(h) test is based on expenditures alone, lobbying time spent by volunteers does not count against a charity's 501(h) limit.

The Section 501(h) rules also define in detail what constitutes lobbying for electing public charities, and provide a number of exceptions to the lobbying definition. Because of these definitions and exceptions, not every expenditure aimed at influencing legislation is treated as a lobbying expense. Any activity that does not fall within the definition of lobbying in the Section 501(h) rules, or falls within an exception, does not count against an electing charity's annual expenditure limit.

Private foundations. Private foundations are effectively prohibited from engaging in lobbying themselves, or from funding a grantee's lobbying, by Section 4945 of the Internal Revenue Code.[23] Section 4945 imposes a punitive two-tier

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[20] *See Christian Echos Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 855 (10th Cir. 1972).
[21] *See* IRC Section 501(c)(3).
[22] As this Guide went to press, legislation was pending in Congress to eliminate the grassroots lobbying limit. If this legislation is enacted into law, electing public charities will have only one lobbying ceiling, limiting the aggregate amount of grassroots and direct lobbying expenditures.
[23] Private foundations are also subject to the "no substantial part" test as a requirement of their Section 501(c)(3) status, but this has little practical significance because of the stricter prohibition in Section 4945.

excise tax on any "taxable expenditure" made by a private foundation; taxable expenditures include amounts paid or incurred to "attempt to influence legislation."

Private foundations are effectively prohibited from engaging in lobbying themselves, or from funding a grantee's lobbying, by Section 4945 of the Internal Revenue Code.

However, these sanctions only apply if a private foundation makes an expenditure that falls within the Section 4945 definition of a "taxable expenditure." Section 4945 and the IRS regulations interpreting it define the types of activities that will be treated as taxable lobbying expenditures, and carve out a number of exceptions for activities that are permissible to a private foundation (and not taxable expenditures) even though they may be undertaken in an attempt to influence legislation.[24]

Section 4945 and the IRS regulations carve out a number of exceptions for activities that are permissible to a private foundation even though they may be undertaken in an attempt to influence legislation.

These rules defining lobbying for Section 4945 purposes are similar in most respects to the Section 501(h) definitions that apply to electing public charities. Indeed, the Section 4945 definition of lobbying applicable to private foundations actually refers to the regulations defining lobbying for Section 501(h) electing public charities, and the two sets of rules have a number of parallel regulations carving out nearly identical exceptions to the definition of lobbying. However, there are some differences between the lobbying exceptions applicable to private foundations and those applicable to electing public charities.

By observing the rules defining lobbying, private foundations can and do provide grant funding for activities that are intended to influence ballot measures. Such permissible activities either do not meet the definition of lobbying, or qualify as nonlobbying activities under an exception, or involve private foundation funding of public charity grantees whose lobbying activities are not attributable to the private foundation. For more information about private foundations and ballot measures, see *The Private Foundation's Guide to the California Initiative Process.* Appendix C describes how to access this companion volume on the web site of Northern California Grantmakers.

[24] Treas. Reg. Section 53.4945-2(a).

B. Lobbying under Section 501(h)

In this section, we give an overview of the rules that define lobbying expenditures for electing public charities. (Lobbying under the "no substantial part" test is discussed below in subsection D.) This overview is not specific to ballot measures, but if a concept is more relevant or differently applied in the ballot measure context, the overview points that out. First, we look at the basic definition of lobbying; next, we look at activities falling outside the definition of lobbying; and finally, we describe some exceptions to the definition of lobbying.

1. Lobbying Expenditures: Key Definitions and Concepts

Lobbying expenditure. An expenditure will be treated as lobbying if it is for either a "grassroots lobbying communication" or a "direct lobbying communication," and no exception applies.[25] The term *communication* should be understood in its broadest sense, encompassing printed materials, letters, radio and television broadcasts, websites and e-mails, speeches, press releases, and one-on-one conversations by phone or in person.

An expenditure will be treated as an attempt to influence legislation if it is for either a "grassroots lobbying communication" or a "direct lobbying communication," and no exception applies.

Direct lobbying communication. A *direct lobbying communication* is an attempt to influence any legislation through communication with a legislator, an employee of a legislative body, or (under some circumstances) any other government official or employee who may participate in the formulation of legislation.[26] Such a communication will be treated as a direct lobbying communication if and only if both of the following two elements are present:

- The communication refers to specific legislation; and
- The communication reflects a view on the legislation.

In the case of a ballot measure, the general public in the state or locality where the vote will take place is considered to be the legislative body. Consequently, individual members of the public are considered "legislators" for the purpose of the direct lobbying definition, and communications to the public or a segment of the public that refer to a specific ballot measure and reflect a view on the measure are direct lobbying communications (unless, as discussed below, an exception applies).[27]

[25] *See* Treas. Reg. Section 53.4911-2(a)(1).
[26] *See* Treas. Reg. Section 56.4911-2(b)(1).
[27] *See* Treas. Reg. Section 56.4911-2(b)(1)(iii).

In the case of a ballot measure, communications to the public or a segment of the public that refer to a specific ballot measure and reflect a view on the measure are direct lobbying communications (unless an exception applies).

Grassroots lobbying communication. A *grassroots lobbying communication* is an attempt to influence legislation by affecting public opinion. A communication to the public or a segment of the public is considered to be grassroots lobbying if and only if all three of the following elements are present[28]:

- The communication refers to specific legislation;
- The communication reflects a view on the legislation; and
- The communication encourages the recipient to take action with respect to the legislation.

The third requirement of a grassroots lobbying communication, often referred to as the "call to action" requirement, is satisfied if the communication urges the recipient to contact a legislator or an employee of a legislative body. A communication also contains a call to action if the communication states the recipient should contact any other government official or employee who may participate in the formulation of legislation—for instance, executive branch officials—if the purpose of urging contact with the government official or employee is to influence legislation. For example, a communication urging recipients to contact the Governor to influence the Governor's budget proposal is a grassroots lobbying communication.

A communication that does not explicitly encourage recipients to contact legislators or officials may nevertheless be treated as a grassroots lobbying communication if it includes statements that are treated as a call to action under Section 501(h) rules. For instance, identifying one or more legislators who will vote on the legislation as opposed to the communication's view with respect to the legislation, undecided, or the recipient's representative in the legislature, is treated as a call to action. Similarly, if a communication includes a petition or tear-off postcard for the recipient to use, or includes a legislator's address or phone number, it has a call to action.[29] A special rule applies to paid mass media advertisements about highly publicized legislation within two weeks of a legislative vote; if this rule applies, a call to action is not required for a communication to be considered grassroots lobbying.

Because the general public is the legislature with respect to ballot measures, communications supporting or opposing ballot measures will generally be direct lobbying, not grassroots lobbying.[30]

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[28] Treas. Reg. Section 53.4911-2(b)(2).
[29] Treas. Reg. Section 56.4911-2(b)(2)(iii).
[30] Some ballot measures are placed on the ballot through a vote of a legislative body. State bond measures in California, for example, are put before the voters by an act of the legislature, and constitutional amendments are

Specific legislation. To fall within the definition of either direct or grassroots lobbying, a communication must refer to "specific legislation." *Legislation* is defined to include action by Congress, any state legislature, local council, or similar legislative body, or action by the public on ballot initiatives, referenda, constitutional amendments, or similar procedures.[31] Because they are voted on by legislative bodies, budgets and the confirmation of federal judicial nominees by the Senate fall within the definition of specific legislation.

Specific legislation includes not only legislation that has been actually introduced, but also a specific legislative proposal that the organization supports or opposes. There is little firm guidance on how detailed a proposal must be to be considered "specific legislation;" we generally advise that if a proposal is detailed enough to tell a legislator how to draft a bill, it is specific legislation. For example, urging a legislator to "get criminals off the street" is not a specific legislative proposal. But if the communication urged mandatory life sentences for all persons convicted of specifically enumerated offences, it would likely qualify as a communication referring to a specific legislative proposal. In the case of a referendum or initiative placed on the ballot by petition, the measure becomes specific legislation when the petition is first circulated among voters for signature.[32]

In the case of a referendum or initiative placed on the ballot by petition, the measure becomes specific legislation when the petition is first circulated among voters for signature.

***Lobbying expenses*.** All costs of preparing a direct or grassroots lobbying communication are lobbying expenditures, including the costs to research, draft, and review the proposed communication, and to publish, mail, or broadcast the final product.[33] This includes the cost of employee time preparing or delivering the communication. In addition to all directly-related costs, a reasonable share of overhead and other indirect costs must be allocated to lobbying activities and counted as lobbying expenses.

Expenses incurred in preparation for making a lobbying communication are also lobbying expenditures. For example, if a public opinion poll is taken for use in crafting an effective lobbying message, the costs of the poll are lobbying expenditures.

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sometimes initiated by the legislature. Any public communications encouraging recipients to contact legislators in support of or opposition to legislation to place a ballot measure before the voters would be grassroots lobbying.

[31] Treas. Reg. Section 56.4911-2(d)(1)(i). "Legislation" also includes a proposed treaty required to be submitted by the President to the Senate for its advice and consent from the time the President's representative begins to negotiate.

[32] Treas. Reg. Section 56.4911-2(d)(1)(ii).

[33] Treas. Reg. Section 56.4911-3(a).

All costs of preparing a direct or grassroots lobbying communication are lobbying expenditures, including the costs to research, draft, and review the proposed communication, and to publish, mail, or broadcast the final product.

Subsequent use. If research or educational materials or other communications (like publications or videotapes) are not initially lobbying communications, but are subsequently used by the organization in lobbying, the question arises whether the original costs to produce the research materials or communications should be treated as preparation-to-lobby expenses. If the organization later uses the communications or research materials in a grassroots lobbying communication—i.e., a communication that refers to and reflects a view on specific legislation and urges recipients to contact legislators—there are specific IRS regulations that apply. These *subsequent use rules* decide whether the initial costs are lobbying expenses based on a "primary purpose" test. If the organization's primary purpose in creating or preparing the materials was not for use in lobbying, the costs to prepare the materials are not lobbying expenses.

The subsequent use rules also provide two safe harbors. First, an organization does not have to treat the costs of creating research materials or a publication as lobbying expenditures if, prior to or contemporaneously with the grassroots lobbying use, the organization makes a substantial public nonlobbying distribution of its research or publication. Unless the research or publication qualifies as nonpartisan analysis, study, or research (described in more detail below), the nonlobbying distribution must be at least as extensive as the grassroots lobbying distribution in order for this safe harbor to apply. Second, an organization does not have to treat the costs of compiling research or preparing a publication as lobbying expenditures if they were paid more than six months before their later use in a grassroots lobbying communication.

If the subsequent lobbying use of the research or publication is carried out by a different organization that is unrelated to the charity that prepared the original non-lobbying materials, the lobbying will not be attributed to the charity that prepared the materials—and its original costs of preparation will not be treated as lobbying expenditures—unless there is clear and convincing evidence that the charity prepared the materials for the primary purpose of lobbying use. To meet this standard, the IRS would have to show that the charity that prepared the nonlobbying research or publication, and the second organization that subsequently used the materials in lobbying, colluded or coordinated their efforts.

The subsequent use rules in the IRS regulations only address the use of research materials or nonlobbying communications in subsequent grassroots lobbying communications. Since members of the public are legislators in the ballot measure context, ballot measure lobbying is usually direct lobbying and the subsequent use rules do not technically apply. But since the IRS has no regulations addressing the situation in the ballot measure context, it is reasonable to believe

that the same "primary purpose" test would determine whether the costs of undertaking research or developing materials should be treated as preparation-to-lobby expenses when the materials are later used in ballot measure lobbying.

As noted above, initiatives and referenda do not become specific legislation until petitions to place them on the ballot begin to circulate. In the pre-circulation phase of an initiative, organizations interested in the topic of a proposed ballot measure engage in a variety of activities related to it, such as coalition building, polling, drafting ballot measure language, research on the topic, and organizational capacity building. Electing charities often assume that none of their expenses before signature gathering begins are lobbying, but some of these activities may be undertaken in preparation for lobbying once the measure is in circulation, in which case the IRS may treat them as lobbying expenditures.

2. Activities Outside the Definition of Lobbying

Some activities are not lobbying because they do not fall within the basic definition of either a direct lobbying communication or a grassroots lobbying communication (and also are not undertaken in preparation for direct or grassroots lobbying communications). For example, a public education campaign on policy issues that does not refer to any specific legislation falls outside the definition of lobbying.[34] Communications that discuss legislation but do not reflect any view on its merits are also outside the definition of lobbying (but remember that a communication can reflect a view even though it avoids any blatant statements of support or opposition to the legislation).

In the case of legislation pending in or proposed to a legislative body, a communication to members of the public that refers to and reflects a view on the legislation, but does not contain a call to action, usually falls outside the definition of lobbying.[35] Such a communication is not direct lobbying because it is not made to legislators, legislative employees, or government officials who may participate in the formulation of legislation; and it is not grassroots lobbying because it contains no call to action. (In the ballot measure context, however, the public is the legislature; a communication that refers to a measure and reflects a view on its merits is direct lobbying regardless of whether a call to action is included.)

Post-passage litigation regarding the constitutionality and interpretation of laws, including laws adopted through ballot measures, is also not treated as lobbying; once passed, a law is not "specific legislation." Administrative agency

[34] Treas. Reg. Section 56.4911-2(c)(2) actually states an "exception" for examinations and discussions of broad social and economic problems; these are not treated as lobbying communications, even if the nature of the problems are such that government would be expected to deal with them ultimately. In the authors' view, this is not really an exception to the general definition of lobbying; but it confirms that charities can communicate about public policy issues without making lobbying expenditures if their communications address broad issues, not specific legislation.

[35] A call to action is not necessary in the case of certain mass media advertisements. *See* Treas. Reg. Section 56.4911-2(b)(5). A call to action can also be implied rather than express. *See* Treas. Reg. Section 56.4911-2(b)(2)(iii).

regulations are also not "specific legislation," so advocacy regarding regulatory rulemaking is not lobbying under Section 501(h).

3. Exceptions to the Definition of Lobbying

Even if a communication falls within the general definition of a direct or grassroots lobbying communication, the expenses to produce and distribute it will not be treated as lobbying expenditures if the communication falls within one of four exceptions.

Nonpartisan analysis, study, or research.[36] It is not lobbying to distribute or otherwise make available the results of nonpartisan analysis, study, and research, either to the public or to legislators. For the purposes of this exception, *nonpartisan analysis, study, or research* means an independent and objective exposition of an issue, including a sufficiently full and fair exposition of the pertinent facts to enable the recipient to form an independent opinion or conclusion on the issue. To qualify for this exception, a communication cannot be a mere presentation of unsupported opinion. A communication can qualify as nonpartisan analysis, study, or research even if it both refers to specific legislation and reflects a view on the legislation.

It is not lobbying to distribute or otherwise make available the results of nonpartisan analysis, study, and research.

Nonpartisan analysis, study, or research means an independent and objective exposition of an issue, including a sufficiently full and fair exposition of the pertinent facts to enable the recipient to form an independent opinion or conclusion on the issue.

The results of nonpartisan analysis, study, or research may be made available to the public by any suitable means, including speeches, published reports, or website postings. The distribution cannot be confined or directed solely to people interested in one side of the issue, however, so if a research report is distributed only to likely proponents or opponents of a ballot measure, it will not qualify for this lobbying exception.

Under IRS rules, nonpartisan analysis, study, or research cannot directly encourage the recipient to take action with respect to specific legislation, meaning it cannot contain a call to action urging recipients to contact their legislators. The tax law rules do not address what, if anything, might constitute a "call to action" in the context of ballot measure direct lobbying; the safest course of action is to refrain from directly encouraging recipients to vote for or against the measure in any communication intended to qualify as nonpartisan analysis, study, or research.

[36] Treas. Reg. Section 56.4911-2(c)(1).

Technical advice or assistance.[37] If a governmental body, committee, or subcommittee makes a written request to a charity for technical advice or assistance on legislation, the charity's costs incurred to comply with the request are not treated as lobbying, even if the response reflects a view on specific legislation and would not qualify as nonpartisan analysis. For example, if a legislative committee requests that a charity testify at a hearing on a proposed bill, the charity's costs to research, prepare, and present its testimony are not treated as lobbying expenditures. The request must be made in writing, in advance, and in the name of the committee, subcommittee, or governmental body, rather than an individual member; and the response must be made available to every member of the requesting body. For the exception to apply, the charity's opinions or recommendations may only be given if specifically requested by the committee or body, or if directly related to materials requested by the committee or body. In the ballot measure context, this exception could only be relevant if legislative hearings are held on a proposed ballot measure.

If a governmental body, committee, or subcommittee makes a written request to a charity for technical advice or assistance on legislation, the charity's costs incurred to comply with the request are not treated as lobbying,

Self-defense lobbying.[38] Charities are permitted to engage in direct lobbying of legislators regarding legislation that might affect the existence of the charity, its powers and duties, its tax-exempt status, or the deductibility of donations to the charity, without such lobbying counting against its Section 501(h) lobbying limit. For example, a charity can engage in direct communications with California legislators to urge the enactment of more generous state income tax deductions for charitable donations, and the costs would not be considered lobbying expenditures under Section 501(h). However, only direct lobbying is covered by this exception; any grassroots lobbying that urges members of the public to contact their representatives in support of or opposition to legislation will count against a charity's grassroots lobbying limit.

Also, this exception does not cover all legislation that might conceivably affect a charity's operations, but is generally understood to encompass legislation which is in some way specific to the tax-exempt status of charities or the deductibility of gifts to them, or in some way affects the rights or duties of tax-exempt charities as a class differently from other types of organizations. There is limited guidance on the scope of this exception, so legal counsel should be consulted before using it. Ballot measure lobbying is generally direct lobbying, and charities have been able to use this exception in several appropriate ballot measure cases.

[37] Treas. Reg. Section 56.4911-2(c)(3) (referring to Treas. Reg. Section 53.4945-2(d)(2)).
[38] Treas. Reg. Section 56.4911-2(c)(4).

Member communications.[39] Under Section 501(h), some communications between a charity and its members are treated more leniently than communications with nonmembers. A *member* for this purpose is any one who pays dues or contributes more than a nominal amount of time or money to the electing charity. (A "life member" with more than a nominal connection with the charity also counts, even if the life member is not a current donor or volunteer, as long as the charity has a limited number of them.) Under these rules, communications that are directed only to members can both refer to and reflect a view on legislation without being considered lobbying, as long as (1) the legislation discussed is of direct interest to the charity and its members, and (2) the communication does not encourage members to either contact their legislators or ask any one else to contact their legislators.

IRS regulations do not indicate whether these membership communication rules apply in the context of ballot measures if the charity's members are part of the electorate who may vote on a pending ballot measure. It is reasonable to believe the exception applies, and that public charities can communicate with their own members about ballot measures that are of direct interest to the organization without having to treat the costs of such membership communications as lobbying. However, we recommend that electing public charities wishing to use this exception limit their communications to discussing the contents of the measure and the charity's position on it, and refrain from urging members to vote for or against it.

If a member communication refers to and reflects a view on specific legislation, and also encourages members to contact their legislators, the communication is treated as a direct lobbying expenditure. (A comparable communication to a nonmember would be considered grassroots lobbying.) If the communication encourages members to ask their friends and neighbors (who are not members) to contact their legislators, the communication is grassroots lobbying. The cost of communications that are primarily but not exclusively made to members must be allocated between lobbying and nonlobbying, or direct lobbying and grassroots lobbying, in accordance with detailed IRS regulations.

C. Section 501(h) Lobbying Ceilings

A public charity that makes the Section 501(h) election may lobby without penalty or risk to its exempt status as long as it keeps its lobbying expenditures below certain ceilings, which are calculated based on the charity's "exempt purpose expenditures" for the year. *Exempt purpose expenditures* are almost everything spent by the charity to accomplish its exempt purposes, including program expenses (both lobbying and nonlobbying), administration and overhead expenses, and straight-line depreciation of assets used for charitable purposes. Fundraising costs paid to an outside vendor or consultant or incurred by a separate development unit within the charity are not exempt purpose expenditures, but other fundraising costs (for example, the cost of time spent by the executive

[39] Treas. Reg. Section 56.4911-5.

director fundraising) do count as exempt purpose expenditures. Other exclusions from the definition of exempt purpose expenditures are capital expenditures, and expenses related to managing investments or generating unrelated business income.

An electing charity's overall lobbying ceiling is a declining percentage of exempt purpose expenditures, calculated as follows:

- 20% of the first $500,000 of exempt purpose expenditures; plus
- 15% of the second $500,000 of exempt purpose expenditures; plus
- 10% of the third $500,000 of exempt purpose expenditures; plus
- 5% of exempt purpose expenditures over $1,500,000, up to a $1 million limit.

The overall lobbying ceiling is capped at $1 million per year regardless of the level of a charity's exempt purpose expenditures. The grass roots lobbying limit is one-quarter of the total lobbying limit.[40]

For example, a public charity with $2 million in exempt purpose expenditures has an overall lobbying limit of $250,000 for the year. (This is 20% of the first $500,000 in exempt purpose expenditures, or $100,000; plus 15% of the second $500,000, or $75,000; plus 10% of the third $500,000, or $50,000; plus 5% of the remaining exempt purpose expenditures, which in this case is 5% of 500,000 or $25,000.) The charity may spend all of this amount on direct lobbying expenditures, or may spend it on a combination of direct and grassroots lobbying; but in no event can more than a quarter of its overall limit (in this example $62,500) be spent on grassroots lobbying.

To prevent a large charity from breaking itself into a series of smaller ones to obtain a higher total lobbying limit for the group, the Section 501(h) rules include anti-abuse provisions that treat certain closely affiliated charities as one unit in calculating their lobbying limits.

D. Lobbying under the "No Substantial Part" Test

There is significantly less guidance available to determine what qualifies as lobbying under the "no substantial part" test for public charities that cannot or do not make a Section 501(h) election. In contrast to the pages of specific rules and examples for electing public charities, IRS regulations addressing lobbying by non-electing charities consist of a few brief paragraphs.[41]

[40] As of this writing, legislation is pending in Congress to eliminate the separate cap for grassroots lobbying expenditures.
[41] *See* Treas. Reg. Section 1.501(c)(3)-1(c)(3)(ii), (iv).

Under the "no substantial part" test, a charity engages in lobbying when it does any of the following:

- Contacts legislators to propose, support, or oppose legislation
- Urges the public to contact legislators to propose, support, or oppose legislation
- Advocates the adoption or rejection of legislation

Asking executive branch officials to support or oppose legislation is considered lobbying under this definition.

The term "legislation" is defined to include action by Congress or by any state legislature, local council, or similar governing body, or action by the public in a referendum, initiative, constitutional amendment, or similar procedure. Hence, advocating the passage or defeat of a ballot measure is a lobbying activity for a non-electing public charity. On the other hand, participating in a regulatory proceeding is not lobbying.

Nonpartisan analysis, study, or research is not considered lobbying for non-electing charities.[42] To qualify as nonpartisan, a publication must present a full and fair exposition of the facts sufficient to allow a reader to form an independent opinion.[43]

Although nonpartisan analysis, study, and research may be treated as a nonlobbying educational activity when considered by itself, the IRS may take other activities of a non-electing charity into account when it determines whether nonpartisan analysis should be considered lobbying. The IRS takes the position that under the "no substantial part" test, nonlobbying educational activities may be part of a broader campaign to influence specific legislation.[44] In other words, if a non-electing charity advocates the adoption or defeat of legislation, the IRS may consider educational activities related to that legislation to be part of the charity's lobbying effort—even if the educational activities would not be lobbying when considered in isolation.

While there is no formal exception for providing technical assistance to a government body, the IRS determined in one case that responding to an official request to testify on the possible effects of proposed legislation was not a lobbying activity for a non-electing charity.[45] It is unclear whether any kind of "self-defense" exception applies when non-electing charities communicate to legislators about changes in the law affecting their existence or tax-exempt status.

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[42] *See* Treas. Reg. Section 1.501(c)(3)-1(c)(3)(iv); Rev. Rul. 64-195, 1964-2 CB 138; Rev. Rul. 70-79, 1970-1 CB 127.
[43] *See Haswell v. U.S.*, 500 F.2d 1133, 1144 (Ct. Cl. 1974).
[44] Judith E. Kindell and John Francis Reilly, "Lobbying Issues," in IRS, Exempt Organizations Division, Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 1997, at page 276.
[45] *See* Rev. Rul. 70-449, 1970-2 Cum. Bull. 111.

In determining whether a non-electing charity's lobbying activities are substantial, staff and volunteer time spent preparing to support or oppose legislation is counted along with the time spent on actual lobbying activities.[46]

Without the detailed Section 501(h) rules, there is much less certainty regarding where the line is drawn between lobbying and nonlobbying activities. A charity's intentions and aims, the context of its actions, and the balance or bias in its communications may all be relevant to determine whether particular communications are lobbying. In some circumstances, the Section 501(h) rules might indicate how the IRS or a court would view a particular situation, or might be applied by analogy in the absence of rules covering non-electing charities.[47] However, the Section 501(h) rules are not authoritative for non-electing charities, and the IRS may consider many factors in determining whether the activities of a non-electing charity are in support or opposition to legislative proposals.

E. Whether to Make a Section 501(h) Election

For most public charities, the advantages of making a Section 501(h) election substantially outweigh any disadvantages. The Section 501(h) rules provide clarity and certainty regarding how much lobbying is allowed; no such clarity is possible under the "no substantial part" test, where the only guidance is a few dated court cases.

Also, the Section 501(h) election will generally allow public charities to be more vigorous legislative advocates without jeopardizing their exempt status. Detailed definitions of lobbying that apply to an electing charity exclude many activities commonly thought of as lobbying, but these definitions are not necessarily available to non-electing charities. In other words, fewer activities will constitute lobbying under the 501(h) election than under the "no substantial part" test. Some of the more important examples are using volunteers to lobby; endorsing legislation without spending money to promote the endorsement; public commentary on legislation pending before a legislature without a call to action; and self-defense lobbying. In addition, the level of lobbying permitted to smaller organizations under Section 501(h) (up to 20% of program and administrative expenditures) would clearly be considered a substantial activity, and would exceed the level of lobbying permitted under the "no substantial part" test.

However, for a charity with a very large budget, the maximum lobbying ceiling of $1 million could represent an insubstantial part of its activities overall. For example, $1 million spent on lobbying would make up less than 3% of the budget of a charity that spent $30 million per year (though under the "no substantial part" test, not only expenditures but also the activities of volunteers and other factors would be considered to determine whether the lobbying was

[46] *See League of Women Voters v. U.S.*, 148 Ct. Cl. 561 (1960).
[47] *See Haswell v. U.S.*, 500 F.2d 1133, 1144 (Ct. Cl. 1974) (using Section 4945 regulations to interpret the nonpartisan analysis exception in the "no substantial part" test).

substantial). Hence, for very large charities, Section 501(h) will often be more limiting than the "no substantial part" test. Also, because the grass roots ceiling is so low, it is possible that a charity that only engages in grass roots lobbying could spend more than Section 501(h) permits, and still be able to claim its lobbying was insubstantial relative to the rest of its activities.

A public charity can make a Section 501(h) election at any time during its fiscal year by filing IRS Form 5786. The election will be effective for the entire year in which the form is filed. In other words, for a public charity that files its taxes on a calendar year basis, an election filed at any time during 2004 will be effective retroactive to January 1, 2004. The election remains in effect for subsequent years without further action by the charity. The Section 501(h) election can be revoked if a public charity wishes to return to the "no substantial part" test by filing another Form 5786, but the revocation will only take effect at the beginning the next tax year.

F. Grantmaking Activities

The lobbying rules for electing and non-electing public charities discussed above apply when a charity pays its own staff or hires outside contractors to engage in an activity directly. This section discusses the rules that apply when an electing or non-electing charity makes grants to other organizations. (For additional information about the lobbying rules applicable to a private foundation grantmaker, see *The Private Foundation's Guide to the California Initiative Process*, which is listed in Appendix C.)

1. Grantmaking to Other Public Charities

When a public charity makes a grant to another public charity that is restricted for a particular project, the outcome if often obvious: if a grant to an operating charity is restricted for a project that includes no lobbying, the grant is not a lobbying expenditure, but if the grant is earmarked for an activity that is lobbying, the grant would be treated as a lobbying expenditure.

But what about unrestricted grants to other public charities, or restricted grants for projects that are only partially funded by the grantmaking charity and include both lobbying and nonlobbying activities? For private foundations, there are IRS regulations that address these situations. Grantmakers that are public charities, like community foundations or other public foundations, are not technically covered by the private foundation rules, but there are no comparable IRS regulations that address their situation. Under these circumstances, applying the private foundation rules (which govern the treatment of grantors that are absolutely prohibited from lobbying) should be a safe approach for public charity grantors.

General support grants. A *general support grant* is an unrestricted grant or donation which the grantee's Board of Directors may decide to use for any of the grantee's programs or expenses. When a private foundation makes a general support grant to a public charity, the grant will not be treated as a lobbying expenditure—even if the grantee uses the funds to engage in lobbying activities—as long as the grant is not "earmarked" for lobbying.[48] A grant is *earmarked* for lobbying if the grant is made pursuant to an oral or written agreement that the grant funds will be used for that purpose.[49]

Public charities may make general support grants to other public charities without concern that any lobbying activities of the grantee will be attributed to the grantor.

By analogy, public charities may make general support grants to other public charities without concern that any lobbying activities of the grantee will be attributed to the grantor. However, the grant must be truly unrestricted in order to take advantage of this rule. If staff members of the grantor and the grantee have a tacit agreement that the grant will be used for a particular purpose, the grant is earmarked for that purpose and must be analyzed as a specific project grant.

Specific project grants. A *specific project grant* is a restricted grant made to support one or more specific projects or programs of the grantee. When a private foundation makes a specific project grant to a public charity, the grant will not be a lobbying expenditure as long as two requirements are met. First, as with a general support grant, the grant cannot be earmarked for lobbying. Second, the amount of the grant cannot exceed the amount budgeted by the grantee public charity for nonlobbying activities of the project.[50]

For example, imagine that a public charity applies for a grant for a specific project with a $100,000 budget, $80,000 of which will be spent on nonlobbying activities and $20,000 on lobbying communications. A private foundation makes a $50,000 grant to the public charity specifically for the project, but not earmarked for the lobbying portion of the project. So long as the amount of the grant is less than the nonlobbying portion of the budget, the grant will not be treated as a lobbying expenditure by the private foundation.

Similarly, a public charity grantor can fund projects of other public charities that include lobbying, without counting any part of the grant as a lobbying expenditure, if the amount of the grant is less than the nonlobbying portion of the project budget. The grantor should obtain either a project budget from the grantee

[48] This rule applies whether or not the grantee public charity has made a 501(h) election.

[49] Treas. Reg. Section 53.4945-2(a)(5)(i), (6)(i).

[50] Treas. Reg. Section 53.4945-2(a)(6)(ii). This rule is also known as the "McIntosh rule" after case involving a private foundation that came to this conclusion. The decision in that case is now reflected in the IRS regulations.

clearly showing the nonlobbying allocation, or a signed statement from the grantee of the nonlobbying amount.

Grantee subsequent use. What if a public charity makes a grant to another public charity to produce a nonlobbying communication—for example, a nonpartisan research report—and the grantee subsequently uses the report in lobbying communications?

As discussed above, for electing public charities, the Section 501(h) subsequent use rules apply a primary purpose test to determine whether a later grassroots lobbying use of nonlobbying materials will cause the original cost of producing the materials to be treated as lobbying expenditures. These subsequent use rules provide that if the grantee and grantor are unrelated organizations, the grantee's later lobbying use of grant-funded research or publications will not cause the grant to be a lobbying expenditure unless the IRS can show, by clear and convincing evidence, that the grantor funded the research or publication primarily so it could be used for lobbying. To make this showing, the IRS would have to demonstrate some cooperation or collusion between the grantee and grantor.

For grantors that are non-electing charities, there are no specific rules that address a grantee's subsequent lobbying use of grant-funded research or publications. When a private foundation makes a grant to a public charity to fund a nonlobbying communication that is later used by the grantee in lobbying, IRS rules provide that the private foundation's grant will not be characterized as a lobbying expenditure unless either (1) the foundation knew (or reasonably should have known) at the time it made the grant that the grantee's primary purpose in preparing the report was to use it in lobbying, or (2) the foundation's primary purpose in making the grant to the public charity was for lobbying.[51] In the absence of a comparable rule for non-electing public charities that make grants, the IRS would probably apply a similar primary purpose test.

Prohibitions on lobbying in the grant agreement. One final important point on the subject of lobbying attribution and grants: even if federal tax law permits a public charity grantee to use funds from a grantor to lobby without attribution to the grantor, this flexibility is lost if the grant agreement includes an absolute lobbying prohibition. In that case, the contractual agreement is binding on the grantee, even if it is more stringent than what tax law requires. Grantors should therefore draft their grant agreements carefully, to protect themselves while maintaining maximum flexibility for their grantees.

2. Grantmaking to Noncharities

Public charities can make grants to organization that are not themselves exempt under Section 501(c)(3); but they must ensure that the funds are used for charitable purposes, and not used to support or oppose candidates for public office,

[51] Treas. Reg. Section 53.4945-2(d)(v)(B).

to benefit private persons, or for other inappropriate activities. Generally, this means that a public charity should engage in some pre-grant due diligence to determine that the proposed grantee can carry out the charitable purpose of the grant, and then should enter into a grant agreement with the grantee that describes the charitable activities or project to be funded, requires reports back to the grantor, and provides that the grantee must return any funds that were not spent for the restricted purposes stated in the grant agreement. A charity should generally not make an unrestricted or general support grant to any noncharitable entity.

The Section 501(h) rules specifically address transfers by electing public charities to noncharitable organizations that lobby (like Section 501(c)(4) affiliates or Ballot Measure Committees). For transfers that are not "controlled grants" (as defined below), the transfer will be treated as a grassroots lobbying expenditure to the extent of the recipient organization's grassroots lobbying spending. If the charity's transfer is larger than the amount recipient's grassroots lobbying expenditures, the remainder of the transfer will be direct lobbying to the extent of the recipient's direct lobbying spending. In other words, if an electing charity grants $5,000 without restrictions to a Section 501(c)(4) recipient that makes $10,000 of grassroots lobbying expenditures during the year, the charity must treat the entire $5,000 as a grassroots lobbying expenditure. But if the recipient spends only $1,000 on grassroots lobbying and $10,000 on direct lobbying, then the charity must treat $1,000 of its unrestricted $5,000 grant as grassroots lobbying, and the remaining $4,000 of the grant as direct lobbying. In general, a Ballot Measure Committee's activities will consist entirely of direct lobbying, so a charity's grant to a Ballot Measure Committee would be considered a direct lobbying expenditure by the charity.

The rules are different for controlled grants. A *controlled grant* is a grant that is restricted by the charity to a specific nonlobbying charitable project of the recipient. For a grant to qualify as a controlled grant, the charity must maintain records to establish that the grant was used by the recipient for a nonlobbying charitable purpose. Public charities that make controlled grants to noncharities must enter into a signed, written agreement with the grantee that describes the project to be funded and requires the grantee to report back to the grantmaker about the use of funds and to return any funds not spent for the project. A controlled grant is not treated as a lobbying expenditure by an electing charity.

For non-electing charities, there are no specific rules to address the treatment of grants to noncharitable entities. Grants to a Ballot Measure Committee will be treated as lobbying activities, as are grants that the charity intends to be used for lobbying purposes. By analogy, grants for charitable activities that meet the definition of a "controlled grant" above probably would not treated as a lobbying activity for a non-electing grantmaker (assuming that all the facts and circumstances indicated that the grant was not intended to influence legislation).

Appendix C: Resources

A. Resources on Lobbying and Public Charities

- *Being a Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities*. Written by Gail M. Harmon, Jessica A. Ladd, and Eleanor A. Evans; published in 2000 by the Alliance for Justice. Available at www.allianceforjustice.org.

- *Seize the Initiative*. Written by Gregory L. Colvin and Lowell Finley; published in 1996 by the Alliance for Justice. Available at www.allianceforjustice.org.

  The Alliance for Justice publishes a number of other useful guides to charity advocacy; the full list appears on its website.

- *The Nonprofit Lobbying Guide, Second Edition.* Written by Bob Smucker; published in 1999 by Charity Lobbying in the Public Interest. Available at www.clpi.org.

- www.NPAction.Org. Website on nonprofit advocacy hosted by OMB Watch that includes extensive information on lobbying rules in each state.

- *IRS 1997 Exempt Organizations Continuing Professional Education Technical Instruction Program*. This IRS publication includes an article, mostly in question and answer format, on lobbying issues by IRS employees Judith E. Kindell and John Francis Reilly. It is only resource listed that covers the lobbying rules for non-electing charities. The article is available at www.irs.gov. (On left side of page, click on "Charities & Non-Profits." Then, on the left side of that page, click on Topics "EO Tax Law Training." On the main part of that page, click on "FY 1997," then "Lobbying Issues.")

B. Resources on Lobbying and Private Foundations

- *The Private Foundation's Guide to the California Initiative Process*. Written by Rosemary E. Fei, Diane M. Fishburn, and Barbara K. Rhomberg; published in 2003 by Northern California Grantmakers. Available at www.ncg.org. (To access the Guide, click on "Programs & Services," and on that menu choose "Public Policy" and then "Resources.")

- *Foundations and Ballot Measures: A Legal Guide*. Written by Thomas R. Asher; published in 1998 by the Alliance for Justice. Available at www.allianceforjustice.org.

- *Myth v. Fact: Foundation Support of Advocacy.* Written by Thomas R. Asher; published in 1995 by the Alliance for Justice. Available at www.allianceforjustice.org.

C. California Agencies Administering the Political Reform Act

- *California Secretary of State.* Campaign finance disclosure reports are filed with, and made public by, this agency. More information and forms are available at www.ss.ca.gov under "Campaign and Lobbying Information."

- *California Fair Political Practices Commission*. This agency interprets and enforces the Political Reform Act. More information and publications are available at www.fppc.ca.gov.